Supreme Court, U.S.
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No. 94-1675

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term, 1994

CITY OF UPPER ARLINGTON, *et al.*,

*Petitioners*,

*v.*

JAMES VITTITOW, *et al.*,

*Respondents*,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

# REPLY BRIEF FOR PETITIONERS

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# QUESTION PRESENTED

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WHETHER REGULATION OF PICKETING THAT CREATES A CAPTIVE AUDIENCE IN THE HOME IS RESTRICTED BY THE FIRST AMENDMENT SOLELY TO PICKETING THAT OCCURS DIRECTLY IN FRONT OF A PARTICULAR RESIDENCE?

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# REPLY BRIEF FOR PETITIONERS ON PETITION FOR A WRIT OF CERTIORARI

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The most important reason why certiorari is warranted in this case is that the lower courts cannot be permitted to relegate *Frisby v. Schultz*, 487 U.S. 474 (1988), to precedential oblivion by drawing artificial distinctions that make no practical difference under the Court's rationale in *Frisby*. The vitality of that rationale is critical to local governments struggling to accommodate interests in freedom of expression and privacy in response

to imaginative and persistent tactics of invasive residential picketing. Lower courts should not be permitted to reduce *Frisby* to an insignificantly narrow legal principle.

The decision below cannot be dismissed as an aberration in this regard. Since the petition was filed in this case, the artificially narrow interpretation of *Frisby* rendered by the court below has been invoked to strike down a similar ordinance in similar circumstances, again based on the specious view that *Frisby* precludes regulation of residential picketing "beyond the area 'solely in front of a particular residence.'" *Kirkeby v. Furness*, 1995 WL 231112 (8th Cir. Apr. 20, 1995) (quoting *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1105 (6th Cir. 1995) [Pet. App. at A-14]). A split panel of the Eighth Circuit wanly endorsed the approach taken by the court below to *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 129 L. Ed.2d 593 (1994), "We believe that this reading of *Madsen* is not obviously wrong, and, indeed, has much to recommend it." 1995 WL 231112, *2.[1] The panel majority, following the pattern of the court below, then reversed a trial court's contrary ruling.

Judge Gibson dissented in *Kirkeby*. He observed that the ordinance at issue "prohibited only targeted residential picketing and clearly defined such picketing" and, further, was a necessary measure "where the picketing is narrowly directed at the household and not the public."

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[1] One reason for the panel's paradoxical formulation may have been its recognition that "*Madsen* did not involve an ordinance, but an injunction, which the Supreme Court explicitly judged under a stricter standard." *Kirkeby*, *supra*, at *2. This distinction merits greater respect in the constitutional analysis and further demonstrates the need for this Court to clarify the impact of the combination of *Frisby* and *Madsen* on ordinances narrowly tailored to preserve residential privacy.

*Kirkeby*, *supra*, at *4 (Gibson, J., dissenting). Based on these premises, he stressed that the panel majority "errs grievously and ignores the strong policy interest in protecting residential privacy" that was articulated and vindicated in this Court's *Frisby* decision. *Id.*

Respondents' opposition to certiorari is significantly silent about what little would remain of *Frisby*'s holding were the decision below permitted to stand in disregard of that controlling precedent. To the contrary, Respondents bluntly contend that Petitioners "deliberately disregarded *Frisby*," Opp. at 9. Of course, the City of Upper Arlington adopted and enforced the very same residential picketing ordinance that this Court upheld against constitutional challenge in *Frisby* and did so in service of the very constitutional interest -- residential privacy -- that fueled the rationale in *Frisby*. Unless *Madsen* was intended to overrule, *sub silentio*, the balancing of interests in *Frisby*, the Court needs to grant review here to dispel an erroneous impression that some lower courts have drawn.

Respondents are also largely silent on another important point: the different approaches that the lower courts have taken on this issue. Those distinct positions and holdings have already been fully recounted, *see* Pet. at 16-19, and, augmented by the *Kirkeby* split decision, they cry out for harmonization by this Court.

In fact, a petition for a writ of certiorari is pending before the Court in one of the cases directly in conflict with this case. *Murray v. Lawson*, 138 N.J. 206, 649 A.2d 1253 (N.J. 1994), *cert. filed*, No. 94-1450 (U.S., Mar. 1, 1995). Petitioners respectfully suggest that it would be appropriate for the Court to grant plenary review in this case and hold *Murray* until the merits decision or grant plenary review in both cases and have them briefed and

argued in tandem. This course would be the most sensible one to take because, unlike *Murray*, this case presents the distinctive situation of an ordinance being struck down, despite the Court's mandate in *Madsen* that ordinances receive more constitutional deference than injunctions, a mandate that has also been the subject of disagreement among the lower courts. *Contrast Kirkeby*, *supra*, at *2 (striking down ordinance creating 200-foot residential buffer zone), *with City of San Jose v. Superior Court*, 32 Cal. App.4th 330, 38 Cal. Rptr.2d 205 (1995)(upholding ordinance creating 300-foot residential buffer zone)

Indeed, Respondents' perhaps facetious comment that "[c]ontrary to the best efforts of some litigants, municipalities and lower court judges, there is really very little to be confused about in the aftermath of *Frisby*," Opp. at 10-11, completely begs the question. If lower court judges, local governments, and some litigants are indeed confused about where *Frisby* leads -- as in truth they are, despite their best efforts -- and are dissatisfied with the dead-letter formulation of the *Frisby* holding championed by those whose primary objective is to impose a captive audience and thus dissuade by coercion the target of their picketing from conduct they despise, then these are very strong reasons for the Court to review this case.

Finally, Respondents assert two reasons for denying a writ of certiorari, both of which are easily dispatched. Respondents first assert that their conduct does not raise the question posed in the petition. *See* Opp. at 8-9. This assertion is perplexing since the court below struck down the residential picketing ordinance in this case precisely because the picketers walked in front of more homes than

just the targeted residence. Consequently, Respondents' picketing squarely raises the question posed in the petition.[2]

Respondents' only other justification for denying review is their claim that their conduct was protected under *Frisby*. Yet, that is the very question at the heart of this case: whether *Frisby* should be accorded the narrowest possible interpretation, which does not permit any regulation of residential picketing beyond the area directly in front of a targeted residence. Respondents' argument that they have satisfied *Frisby* is one directed at the merits, not at whether this Court should grant review to resolve an important and increasing conflict in the lower courts over both how to apply *Frisby* and whether residential privacy can adequately be protected under their crabbed interpretation of *Frisby*.

In the end, Respondents' soothing refrain that clarity and harmony prevail on the constitutional issues surrounding the controversial and divisive technique of residential picketing utterly fails to mask the current troubled state of the *Frisby* holding. Respondents even pose several "questions" of their own. Opp. at 11. The ambiguities thus belatedly conceded by Respondents reveal the difficulties that lower courts, local governments, and litigants will continue to suffer absent intervention by this Court.

It is becoming increasingly apparent that lower courts will be inclined on their own effectively to overrule *Frisby* by limiting its holding to an absurdly insignifican

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[2] The Eighth Circuit panel in *Kirkeby*, *supra*, at *2, recognized that the issue of the proper interpretation of *Frisby* was directly presented on similar facts and also read the decision of the court below in exactly the same fashion as Petitioners do.

sphere. This Court has emphatically stated, however, that the lower courts must leave "to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Alternatively, the lower courts will be forced to diverge ever more from a uniform approach to the constitutionality of comparable ordinances. The Court's controlling opinion in *Frisby* deserves more than such an indecent burial, and residential privacy ought not be subject to such conflicting treatment.

## CONCLUSION

For these reasons, as well as those set out at more length in the petition, a writ of certiorari should be granted in this case.

Respectfully submitted,

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